BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELIAS ABURTO DAMIAN	)	
Claimant	)	
	)	Docket Nos. 255,616 &
VS.	)	265,216
	)	
IBP, INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant requested review of the July 29, 2004 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on February 1, 2005.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for the claimant. Wendel W. Wurst of Garden City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Docket Nos. 255,616 and 265,216 were consolidated for litigation with an agreed accident date of May 14, 1999. It was further stipulated that claimant suffered an 11 percent whole person functional impairment. The litigated issue was whether claimant was entitled to a work disability (a permanent partial general disability greater than the whole body functional impairment rating) or whether claimant failed to make a good faith effort to retain accommodated employment with respondent that paid more than 90 percent of his pre-injury average gross weekly wage.

The Administrative Law Judge (ALJ) found the claimant was terminated "for cause." Therefore, the ALJ imputed the wage that claimant was earning while working for

respondent for purposes of claimant's post-injury wage. Consequently, the ALJ awarded claimant permanent partial general disability benefits based upon his 11 percent whole body functional impairment.[1]

The sole issue raised on review by the claimant is the nature and extent of disability. Claimant argues he made a good faith effort to retain his accommodated employment. Claimant further argues respondent failed, in accordance with its own policy, to provide progressive discipline when it terminated him. Accordingly, claimant argues he is entitled to a 62 percent work disability.

Respondent argues its personnel policy provides for summary termination in instances where threats of physical violence are directed at co-employees as well as where an employee refuses to perform his job duties. Respondent further argues claimant's own actions led to his termination from employment and as a result claimant failed to make a good faith effort to retain appropriate employment. Respondent concludes claimant's wage while performing accommodated work with respondent should be imputed which would result in limiting claimant to his functional impairment. Consequently, respondent requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant alleged injury to his shoulders and neck which progressively worsened with continued work activities. Claimant was provided medical treatment and was placed in an job within his restrictions. The job was described as a rumper which required using an air knife to make cuts so that the cow's hide could be removed by workers further down the line. Claimant testified he performed this job for approximately a year.

Claimant noted that he did not re-injure himself after he began the rumper job but that his shoulder pain remained the same.[2] A co-employee noted claimant had told her

[1] The award computation paragraph contains a typographical error stating claimant suffered an 11 percent work disability. But the parties stipulated and agreed that the award was for a functional impairment only.

[2] P.H. Trans. at 8.

that because his shoulder hurt he wanted to quit but that he couldn't because he would not be eligible for unemployment compensation benefits.[3]

In March 2001 claimant received a series of counseling and written warnings regarding his job performance. On March 13, 2001, the claimant received a verbal warning that he was not correctly cutting the hide in the performance of the rumper job. On March 14, 2001, claimant received a written warning that he was not paying attention to his job or watching how his co-employees performed the job. On March 15, 2001, the claimant was counseled for failing to attend a mandatory meeting for knife operators. On March 16, 2001, claimant was again counseled that he was not making an effort to properly perform his job.

On April 26, 2001, Mike Martinez, a floor supervisor, approached the area where claimant and a co-worker were performing the rumper job. Mr. Martinez noticed that some hides were not being properly cut. When he questioned claimant about it, the claimant responded that his knife was dull which prevented him from doing the job. The supervisor asked the co-worker also performing that job to check the knife and she reported it was sharper than her knife and was working properly. When claimant was instructed to do his job, he began yelling at the supervisor, using profanity and finally threatened to "kick his ass." Because the line was shutting down for break, the supervisor walked away and claimant continued threatening the supervisor and told him he was going to wait for the supervisor outside. As claimant went toward the break area he again threatened to wait outside for the supervisor.

The supervisor then went to the kill floor plant superintendent, Juan Carrera, and told him what had just occurred and that claimant had threatened to meet Mr. Martinez outside and kick his butt. Mr. Carrera called human resources and was told to talk to claimant and, if necessary to suspend him with the admonition to come in the following day and speak with human resources. Mr. Carrera then had the general foreman bring claimant to his office. At the meeting, Mr. Carrera testified claimant admitted that he had threatened Mr. Martinez. Mr. Carrera then suspended claimant until the following day when claimant was instructed to meet with human resources personnel.

The claimant was escorted to his locker by a security guard, Mr. Carrera, and the general foreman, Jay Jantzen. Claimant refused to turn over his ID card and was escorted from the plant. The claimant did not return to talk with personnel the following day as he had been instructed.

[3] Detvongsa Depo. at 10.

The claimant gave a different version of the events. Claimant testified that Mr. Martinez started the confrontation by yelling at him and then threatened to beat him up. Claimant further testified that at the meeting with Mr. Carrera he was told he was fired. But two co-workers who worked within a few feet of claimant on April 26, 2001, corroborated Mr. Martinez's version of events and that claimant was yelling, belligerent and aggressive.

A few days later the claimant did return to the plant and met with the human resource manager, Pat Sanders. The claimant said he returned to turn in his equipment and pick up his personal items. Claimant was asked about the incident and again stated that the floor supervisor had threatened him. Ms. Sanders then made the determination, based upon her investigation of the incident as well as the statements by the various witnesses, that claimant should be terminated for misconduct for threatening his supervisor. The claimant's employment with respondent was terminated that day, April 30, 2001.

The Kansas Appellate Courts, beginning with *Foulk*[4], have barred a claimant from receiving work disability benefits if the claimant is offered an accommodated job paying 90 percent or more of his pre-injury wage and is capable of performing the job within his medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decisions is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.[5] Before claimant can claim entitlement to work disability benefits, he must first establish that he made a good faith effort to obtain or retain appropriate employment.[6]

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

genuine,[7] where the accommodated job violates the worker's medical restrictions,[8] or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.[9] The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

But it is initially claimant's burden to prove that he has made a good faith effort to retain appropriate employment. In this case, the ALJ concluded that when claimant refused to perform his job and threatened his supervisor with physical violence the respondent had good cause to terminate his employment. The claimant's failure to conduct himself in an appropriate fashion to retain his employment demonstrated a lack of good faith which resulted in claimant being limited to his functional impairment. The Board agrees.

The claimant had worked at the rumper job for approximately a year before the incident on April 26, 2001. A co-worker said he wanted to quit but couldn't because that would prevent his ability to draw unemployment benefits. When confronted about not properly performing his job on April 26, 2001, the claimant not only refused to perform his job as directed by the floor supervisor but also engaged in shouting profanity and threats of violence to his supervisor. This inappropriate behavior was corroborated by co-workers. The day of the incident the plant superintendent said the claimant admitted he had threatened the floor supervisor.

It should also be noted, that despite claimant's arguments to the contrary, the human resource manager stated the plant policy clearly establishes that certain conduct can result in termination. And threatening injury was specifically proscribed conduct. Lastly, the rules of conduct were provided to claimant at his orientation when hired and he signed that he received and reviewed the rules.

The claimant's refusal to work and threatening to fight his supervisor clearly constitutes a refusal to retain a job claimant was capable of performing. The Board concludes it was appropriate to impute the wage that claimant was earning while working in the rumper position for respondent for purposes of claimant's post-injury wage. As this wage was more than 90 percent of claimant's pre-injury average gross weekly wage the

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[7] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[8] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[9] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

claimant is not entitled to a work disability and is instead limited to his functional impairment.[10]

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated July 29, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2005.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[10] See K.S.A. 44-510e.